



11 DUPONT CIRCLE NW  
SUITE 800  
WASHINGTON, DC 20036  
202-588-5180  
NWLC.ORG

**Testimony of Shiwali Patel, Director of Justice for Student Survivors & Senior Counsel  
National Women's Law Center**

**Democratic Women's Caucus Roundtable:  
"Survivors Deserve Better: Why Secretary DeVos' Title IX Rule Makes Us Less Safe"**

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Thank you for the opportunity to submit testimony to the Democratic Women's Caucus about the Department of Education's recently issued Title IX Rule. The National Women's Law Center has worked for more than 45 years to advance and protect women's and girl's equality and opportunity and has long worked to remove barriers for women and girls in education. Robust protections against and responses to sexual assault and other forms of sexual harassment in school is key to achieving equality of educational opportunity for women and girls.

**I. Introduction**

The National Women's Law Center ("the Center") is a nonprofit organization that has worked since 1972 to combat sex discrimination and expand opportunities for women and girls in every facet of their lives, including education. Founded the same year as Title IX of the Education Amendments of 1972 was enacted, the Center has participated in all major Title IX cases before the Supreme Court as counsel<sup>1</sup> or amici. The Center is committed to eradicating all forms of sex discrimination in school, specifically including discrimination against pregnant and parenting students, LGBTQ students, and students who are vulnerable to multiple forms of discrimination, such as girls of color and girls with disabilities. This work includes a deep commitment to eradicating sexual harassment, including sexual assault, as a barrier to educational success. We equip students with the tools to advocate for their own rights at school, assist policymakers in strengthening protections against sexual harassment and other forms of sex discrimination, and litigate on behalf of students whose schools fail to adequately address their reports of sexual harassment.

As attorneys representing those who have been harmed by sexual violence and other forms of sexual harassment, we know that too often when students seek help from their schools to address the harassment or assault, they are retaliated against or pushed out of school altogether. We also know how important it is for schools to intervene when students are sexually harassed, before it escalates in severity or to the point where students no longer feel safe in school.

## **II. The Reality of Sexual Harassment Against Students**

Over the past several years, while schools have made major strides to address sexual assault against students, too often schools still fail to make adequate efforts to support survivors' opportunities to learn in the wake of sexual harassment. Students are still regularly urged to leave school until their assailants graduate,<sup>2</sup> discouraged from filing formal disciplinary reports or even telling friends about their experience,<sup>3</sup> and denied essential accommodations like dorm changes to allow them to live separately from their assailants.<sup>4</sup> Survivors<sup>5</sup> sometimes still face severe retaliation, including suspension or expulsion, for speaking out about the abuse they faced.<sup>6</sup>

The threat that inadequate school support poses to a survivor's continued education can have particularly grave costs for survivors without significant financial means: they often experience heavy financial costs, including lost scholarships, additional loans to finance additional semesters, reduced future wages due to diminished academic performance, and hefty expenses for housing changes and medical care that should be provided, free of cost, by colleges and universities.<sup>7</sup>

It was only recently that because of the pressure from student advocates<sup>8</sup> and the federal government,<sup>9</sup> have schools begun to rise to their legal and ethical duty to preserve survivors' educational opportunities.<sup>10</sup> Without a doubt, there is still much work to be done. Unfortunately, rather than meet calls to strengthen protections against sexual harassment and for survivors, the Department has moved to weaken Title IX's protections.

### **a. Sexual Harassment is Pervasive in Schools Across the Country and Is Consistently and Vastly Underreported**

Students experience high rates of sexual harassment, including sexual assault. In grades 7-12, 56 percent of girls and 40 percent of boys are sexually harassed in any given school year.<sup>11</sup> More than one in five girls ages 14 to 18 are kissed or touched without their consent.<sup>12</sup> A 2019 study found that about one in four women and 1 in 15 men experience sexual assault while in college.<sup>13</sup> Native, Black, and Latina girls are more likely than white girls to be forced to have sex when they do not want to do so.<sup>14</sup> Fifty-six percent of girls ages 14-18 who are pregnant or parenting are kissed or touched without their consent.<sup>15</sup> More than half of LGBTQ students ages 13 to 21 are sexually harassed at school.<sup>16</sup> Nearly one in four transgender and gender-nonconforming students are sexually assaulted during college.<sup>17</sup> Students with disabilities are 2.9 times more likely than their peers to be sexually assaulted.<sup>18</sup>

When schools fail to provide effective responses, the impact of sexual harassment and assault can be devastating.<sup>19</sup> Too many individuals who experience sexual assault or other forms of sexual harassment end up dropping out of school because they do not feel safe on campus; some are even expelled for lower grades in the wake of their trauma.<sup>20</sup> Thirty-four percent of college student survivors of sexual assault drop out of college.<sup>21</sup>

Reporting sexual assault is hard for most survivors. Only 12 percent of college survivors who experience sexual assault report to their schools or the police.<sup>22</sup> Only 2 percent of girls ages 14 to 18 report sexual assault or harassment.<sup>23</sup> Students often choose not to report for fear of reprisal, because they believe their abuse was not important enough,<sup>24</sup> because they are “embarrassed, ashamed or that it would be too emotionally difficult,”<sup>25</sup> because they think the no one would do anything to help,<sup>26</sup> and because they fear that reporting would make the situation even worse.<sup>27</sup> Common rape myths that victims could have prevented their assault if they had only acted differently, wore something else, or did not consume alcohol, only exacerbate underreporting.

Survivors of sexual assault are also less likely to make a report to law enforcement because criminal reporting often does not serve survivors’ best interests or address their most pressing needs. Police are not in the business of providing supportive measures or other academic accommodations to survivors and making sure that they feel safe at school. And some students—especially students of color, undocumented students,<sup>28</sup> LGBTQ students,<sup>29</sup> and students with disabilities—can be expected to be even less likely than their peers to report sexual assault to the police due to increased risk of being subjected to police violence and/or deportation. Survivors of color also may not want to report to the police if their assailant is non-white, in order to avoid exacerbating the overcriminalization of men and boys of color.

#### **b. Students Who Do Report Campus Sexual Assault Are Often Ignored and Sometimes Even Punished by Their Schools**

Unfortunately, students who reasonably choose not to turn to the police often face hostility from their schools when they try to report. Reliance on common rape myths that blame individuals for the assault and other harassment they experience<sup>30</sup> can lead schools to minimize and discount sexual harassment reports. An inaccurate perception that false accusations of sexual assault are common<sup>31</sup>—despite the fact that men and boys are far more likely to be victims of sexual assault than to be falsely accused of it<sup>32</sup>—can also lead schools to dismiss reports of assault and assume that complainants are being less than truthful. Indeed, many students who report sexual assault and other forms of sexual harassment to their school face discipline as the result of speaking up, for engaging in so-called “consensual” sexual activity<sup>33</sup> or premarital sex,<sup>34</sup> for defending themselves against their harassers,<sup>35</sup> or for merely talking about their assault with other students in violation of a “gag order” or nondisclosure agreement imposed by their school.<sup>36</sup> The Center regularly receives requests for legal assistance from student survivors across the country who have been disciplined by their schools after reporting sexual assault.<sup>37</sup>

Women and girls of color, particularly Black women and girls, already face discriminatory discipline due to race and sex stereotypes.<sup>38</sup> Schools are more likely to ignore, blame, and punish women and girls of color who report sexual harassment due to harmful race and sex stereotypes that label them as “promiscuous,”<sup>39</sup> and less deserving of protection and care.<sup>40</sup> For example, Black women and girls are commonly stereotyped as “Jezebels,” Latina women and girls as “hot-blooded,” Asian American and Pacific Islander women and girls as “submissive, and

naturally erotic,” and a history of colonization leads to Native women and girls being sexually objectified.<sup>41</sup>

Studies show that adults view Black girls as more adult-like and less innocent than their white peers, a phenomenon referred to as “adultification,” and that Black girls are stereotyped as “hypersexualized”; as a result, schools are likely to treat their reports of sexual harassment with less seriousness, and more likely to place blame on Black girls for their victimization.<sup>42</sup> Indeed, Black women and girls are especially likely to be punished by schools for their behaviors.<sup>43</sup>

Similarly, LGBTQ students are less likely to be believed and more likely to be blamed due to stereotypes that they are more “promiscuous,” “hypersexual,” “deviant,” or bring the “attention” upon themselves.<sup>44</sup> Students with disabilities, too, are less likely to be believed because of stereotypes about people with disabilities being less credible<sup>45</sup> and because they may have greater difficulty describing or communicating about the harassment they experienced, particularly if they have a cognitive or developmental disability.<sup>46</sup>

### **III. Legal and Policy Background of Title IX’s Protections Against Sexual Harassment**

#### **a. Supreme Court Decisions and Administrative Guidance through 2016**

In 1997, with the understanding that Title IX’s prohibition against sex discrimination is hollow if a student can be subjected to sexual harassment with impunity, the Department issued its first guidance to educational institutions on the standards that govern their response to sexual harassment. The Department stated that a school will be liable under Title IX if student-on-student sexual harassment creates a hostile educational environment, the school knows or should have known of the harassment, and the school fails to take immediate and appropriate corrective action.<sup>47</sup>

A year later, in 1998, and then in 1999, the U.S. Supreme Court issued two decisions articulating stringent liability standards for private Title IX lawsuits seeking money damages regarding sexual harassment.<sup>48</sup> The Court, however, explained that even if a recipient’s actions in response to sexual harassment do not meet the stringent standards for *monetary liability* in private Title IX lawsuits, the Department can appropriately *administratively enforce* Title IX against a recipient for failing to adequately address sexual harassment as part of its “authority to promulgate and enforce requirements that effectuate the statute’s nondiscrimination mandate.”<sup>49</sup>

Subsequently, the Department carefully reviewed the Supreme Court’s decisions—in particular whether to apply the Court’s stringent standards to the Department’s administrative enforcement of Title IX. The Department underwent a notice and comment process before issuing revised guidance in 2001, ultimately deciding that “the administrative enforcement standards reflected in the 1997 guidance remain valid in [the Department’s Office for Civil Rights (“OCR”)] enforcement actions.”<sup>50</sup>

The Department's 2001 Guidance has been enforced in both Democratic and Republican administrations.<sup>51</sup> It defines sexual harassment as "unwelcome conduct of a sexual nature."<sup>52</sup> The 2001 Guidance requires schools to address student-on-student harassment if *any employee* "knew, or in the exercise of reasonable care should have known" about the harassment. In the context of employee-on-student harassment, the 2001 Guidance requires schools to address harassment "whether or not the [school] has 'notice' of the harassment."<sup>53</sup> Under the 2001 Guidance, the Department would consider schools that failed to "take immediate and effective corrective action" to be in violation of Title IX.<sup>54</sup> These standards have appropriately guided the Department's Office of Civil Rights' (OCR) enforcement activities for almost twenty years, effectuating Title IX's nondiscrimination mandate by requiring schools to quickly and effectively respond to sexual harassment and fulfilling OCR's purpose of ensuring equal access to educational opportunities and enforcing students' civil rights.

Both the 1997 Guidance and 2001 Guidance were reaffirmed, elaborated upon, and clarified through the Department's 2011 Dear Colleague Letter on Sexual Violence and a series of Questions and Answers issued in 2014.<sup>55</sup> These documents provided additional details and examples to help schools comply with their Title IX obligations when responding to sexual violence, including clarifying that schools were required to respond to a hostile educational environment caused by off-campus incidents. These guidance materials recognize that students who experience sexual harassment suffer not only physically and emotionally, but also in their ability to participate in and benefit from educational opportunities. The Department's guidance led to more meaningful action by schools to address sexual harassment and support victims, an increase in reporting by victims to their schools and the Department, more transparency, and greater accountability when institutions failed to comply with Title IX.

#### **b. Trump Administration Weakening of Title IX Protections**

Starting in 2017, the Department began removing significant protections for students and employees who experience sexual harassment. This was apparently motivated by unlawful sex stereotypes that women and girls are likely to lie about sexual assault and other forms of harassment and by the perception that sexual harassment has a relatively trivial impact on those who experience it.

Just weeks before rescinding the 2011 and 2014 Title IX guidances on sexual violence and issuing "interim guidance" in advance of these proposed rules, Secretary DeVos diminished the full range of sexual harassment that deprives students of equal access to educational opportunities, claiming, "if everything is harassment, then nothing is."<sup>56</sup> Former Acting Assistant Secretary Candice Jackson reinforced the myth of false accusations, claiming that "90 percent" of her office's Title IX investigations were the result of "drunk[en]" sexual encounters and regret.<sup>57</sup> And President Trump himself has repeatedly publicly dismissed and disputed allegations of sexual harassment and violence made by women.<sup>58</sup> Tellingly, these officials have not expressed the same skepticism of the denials made by men and boys accused of sexual harassment, including sexual assault.

A year later, on November 29, 2018, the Department issued a Notice of Proposed Rulemaking (“Proposed Rule”) seeking to formally amend the rules implementing Title IX and departing from decades of Department guidance as to Title IX’s requirements.<sup>59</sup> The Proposed Rule allowed—and, in some cases, required—schools to dismiss many reports of sexual harassment and use unfair and retraumatizing procedures in investigations of sexual harassment that are not required in investigations of other types of staff or student misconduct.

The Department received over 124,000 comments on the Proposed Rule—the overwhelming majority in opposition. Numerous commenters reiterated that sexual harassment in education remains highly prevalent yet continues to be vastly underreported and under-investigated, and underscored that many victims are ignored or punished by their schools instead of receiving the help they need to ensure equal educational access. Many commenters, expressed deep concern that the Proposed Rule would exacerbate these existing inequities and encourage a climate where significant sexual harassment goes unchecked.

#### **IV. The Title IX Final Rule**

In the midst of the COVID-19 pandemic and national emergency, when this Administration should have instead been prioritizing providing much needed resources and relief for students and schools, it made schools less safe by issuing its dangerous Title IX Final Rule. The new rule will divert schools’ already sharply limited resources while they operate remotely toward creating and implementing complex new policies before the new school year commences this fall. It will unnecessarily exacerbate confusion and uncertainty for students who are currently in pending Title IX investigations and hearings, which have already been disrupted by the pandemic. Because of this, numerous stakeholders urged the Department to suspend this Title IX rulemaking until after the national emergency has ended and schools have resumed regular operations—including around 200 survivor advocate and civil rights organizations, 33 higher education associations representing thousands of two- and four-year public and private colleges and universities, 53 Members of Congress, and 18 state attorneys general.

The Final Rule will reverse decades of efforts by Congress, the Executive Branch, and state and local governments, to combat the effects of sexual harassment on equal access to education. As explained further below, without adequate justification or explanation, the Final Rule not only removes protections against sexual harassment and imposes disproportionate burdens on survivors, but also reduces schools’ responsibility to respond to sexual harassment—in some cases requiring schools not to respond at all.

##### **a. Ignores Costs to Survivors and Aims to Reduce School Investigations of Sexual Harassment Complaints.**

Contrary to the unequivocal purpose of Title IX, to prevent and redress sexual discrimination in education, the Department’s Final Rule will significantly reduce the number of investigations of sexual harassment that schools conduct. Although the Department trumpets that the Final Rule will save schools about \$179 million each year by drastically reducing the number of sexual

harassment investigations that schools conduct, it acknowledges that the Department “does not have evidence to support the claim that the final regulations will have an effect on the *underlying number* of incidents of sexual harassment.”

Thus, the Department admits the Final Rule will leave many victims of sexual harassment without redress for the discrimination they face in their educational environment. Moreover, the actual net cost will be much higher, given that the Department entirely failed to account for the tremendous costs of the Final Rule to students who experience sexual harassment but will no longer be able to report it, obtain fair investigations and outcomes, and/or receive necessary remedies. This failure is particularly inexcusable given that the harms of sex discrimination are precisely those that Title IX seeks to prevent.

In fact, numerous studies show that a single rape can cost a survivor more than \$240,000,<sup>60</sup> that the average lifetime cost of dating and domestic violence can exceed \$100,000 for women and \$23,000 for men,<sup>61</sup> and that the average lifetime cost of rape results in an annual national economic burden of \$263 billion and a population economic burden of nearly \$3.1 trillion over survivors’ lifetimes.<sup>62</sup> The cost to survivors is beyond financial. Survivors are three times more likely to suffer from depression, six times more likely to have post-traumatic stress disorder, 13 times more likely to abuse alcohol, 26 times more likely to abuse drugs, and four times more likely to contemplate suicide.<sup>63</sup> The Final Rule also fails to account for medical costs for physical and mental injuries; lost tuition and lower educational completion and attainment for victims who are forced to change majors or drop out of school; lost scholarships for victims who receive lower grades as a result of the harassment or violence; and defaults on student loans as a result of losing tuition or scholarships.

#### **b. Adopts the Stringent Deliberate Indifference Standard**

Previously, when alerted to possible sexual harassment, schools were required to respond “reasonably” to sexual harassment by investigating, providing remedies, and preventing the harassment from occurring again.<sup>64</sup> Under the new rule, schools’ responses are deemed acceptable as long as their response is not “*clearly* unreasonable in light of the known circumstances” or “deliberately indifferent”<sup>65</sup>— regardless of whether the response is effective in restoring the victim’s equal access to education. This deliberate indifference standard, established by the Supreme Court in the context of a private right of action against a school for monetary damages, is significantly more relaxed for institutions than the Department’s previous standard and will substantially undercut schools’ responsibility to adhere to Title IX’s requirements.<sup>66</sup> The Department itself has admitted that it is “not required to adopt the liability standards applied by the Supreme Court in private suits for money damages,” acknowledging that as an administrative agency, it is authorized to “‘promulgate and enforce requirements that effectuate [Title IX’s] nondiscrimination mandate, 20 U.S.C. § 1682, even if those requirements do not purport to represent a definition of discrimination under the statute.’”<sup>67</sup> Yet it has nevertheless chosen to hold schools to a lower standard in addressing sexual harassment than its longstanding precedent requires.

Title IX, like other anti-discrimination laws, imposes an obligation on funding recipients not to discriminate, which means that they must prevent discrimination, address discrimination when it occurs, and remedy its effects. That obligation is not met when institutions are held accountable only when they engage in egregious institutional misconduct. The Department has not explained why it has now reversed its decades-long policy, which is consistent with Supreme Court precedent, by importing a liability standard for money damages into its administrative enforcement scheme.

**c. Requires School Action Only When the School Has “Actual Knowledge” of Sexual Harassment**

Previously, schools were required to address: (i) any *employee-on-student* or *student-on-student* sexual harassment if a “responsible employee” knew or should have known about it, and (ii) all *employee-on-student* sexual harassment that occurred “in the context of” the employee’s job duties, regardless of whether a “responsible employee” knew or should have known about it.<sup>68</sup> A “responsible employee” was defined broadly as anyone whom “a student could reasonably believe” had the authority to redress sexual harassment or had the duty to report student misconduct to appropriate school officials.<sup>69</sup> Under the new rule, institutions of higher education will be allowed to ignore all incidents of sexual harassment unless the Title IX coordinator or a school official with “the authority to institute corrective measures” has “actual knowledge” of the incident.<sup>70</sup>

This means under the new rule, colleges and universities can ignore all sexual harassment by a student or school employee unless one of a small subset of high-ranking school employees actually knows about the harassment. Colleges and universities won’t have any obligation to respond when a student tells a residential advisor, teaching assistant, or professor that they are experiencing sexually harassment. They will not even be obligated to address sexual abuse of a college student by a professor—even if the abuse occurs “in the context of” the professor’s job duties—*unless* the student reports it to the Title IX coordinator or an undefined official with “authority to institute corrective measures.”

As survivors from Michigan State University, University of Southern California, and Ohio State University have pointed out, had the proposed rule previously been in place, their schools would have had no responsibility to stop serial predators like Larry Nassar, George Tyndall, or Richard Strauss—just because the victims reported the abuse to coaches and trainers instead of the “right” employees—even though Nassar, Tyndall, and Strauss sexually abused countless students in the context of their jobs as medical doctors.<sup>71</sup>

Although the Department claims that the “authority to institute corrective measures” limitation will give victims in higher education more “autonomy” and “privacy” by allowing them to request help from certain school employees without automatically triggering a formal investigation, earlier Title IX guidance documents already instructed schools not to initiate an investigation without the victim’s consent and to honor their requests for confidentiality. For example, the earlier guidance documents instructed schools to provide supportive measures without initiating an investigation if the victim requested, and to designate certain employees



as confidential employees to whom students could disclose sexual harassment without giving their school “notice” of the incident.<sup>72</sup> Moreover, despite claiming to protect survivors’ autonomy around whether to initiate an investigation, this change in fact allows schools to override students’ request not to initiate an investigation, and in doing so, will require an unwilling complainant’s identity be revealed to the respondent.<sup>73</sup> As a result, the Final Rule fails to protect confidentiality for victims who wish to report sexual harassment.

**d. Prohibits Schools from Investigating Sexual Harassment Occurring Outside Narrowly-Defined School Programs or Activities**

Previously, Department of Education policy required schools to investigate all student complaints of sexual harassment, regardless of where the harassment occurred, to determine if the harassment had affected the student’s ability to participate in classes and other school activities.<sup>74</sup> This recognized that a survivor’s ability to feel safe in school and learn could be impacted by sexual harassment no matter where it occurs. Under the new rule, however, schools will be required to dismiss<sup>75</sup> all complaints of sexual harassment that occurs during study abroad programs or that occurs outside of a school program or activity.<sup>76</sup> According to the Department, the only incidents that occur within a school program or activity (and therefore are not required to be dismissed) are those where the school has “substantial control” over both the respondent and the context of the harassment, or those that occur in a building owned or controlled by a student organization that is officially recognized by a college or university.

The Department’s previous guidance was consistent with the fact that many students experience sexual harassment in off-campus locations. For example, according to a 2014 U.S. Department of Justice report, 95 percent of sexual assaults of female students ages 18-24 occur outside of a school program or activity.<sup>77</sup> Yet this change in the Final Rule means that a student or teacher who sexually assaults a student after school and in a private location is almost certainly beyond the reach of institutional response, including a disciplinary response. In addition, these provisions will limit a recipient’s ability to address sexual harassment occurring on social media or outside of school, even if the conduct results in the victim becoming too afraid to attend class and face the victim’s harasser, who could be another student or the instructor teaching the victim’s class. This will have drastic consequences as nearly 9 in 10 college students live off campus,<sup>78</sup> including all community and junior college students, and 41 percent of college sexual assaults involve off-campus parties.<sup>79</sup> Moreover, nearly all teenagers are online and of individuals ages 12-17, about 20 to 40 percent have been cyber-bullied, which often includes sexual harassment.<sup>80</sup>

This change will also create inconsistent policies for sexual harassment relative to other student misconduct, prohibiting schools from addressing off-campus sexual harassment even as they address other forms of off-campus behavior that threatens to harm the educational environment, such as drug use or physical assault. Under the Final Rule, schools can continue to respond to underage alcohol consumption at an off-campus party, but will be prohibited from responding to a complaint of sexual harassment that occurs *at the same party*.

**e. Impermissibly Narrows the Definition of “Sexual Harassment” to Exclude Students Who Have Not Suffered Enough.**

Previously, schools were required to investigate all complaints of sexual harassment, which was defined as “unwelcome conduct of a sexual nature.”<sup>81</sup> Under the new rule, schools will be required to dismiss all complaints that do not meet one of DeVos’s three stringent definitions of “sexual harassment”: (i) unwelcome “quid pro quo” sexual harassment by a school employee (e.g., “I’ll give you an A if you have sex with me”); (ii) an incident that meets the definition of “sexual assault,” “dating violence,” “domestic violence,” or “stalking” under the Clery Act; or (iii) “unwelcome conduct” on the basis of sex that is “determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access” to a school program or activity.<sup>82</sup>

This means under the new rule, schools will arguably be required to ignore complaints of sexual harassment unless the victim can show that the harassment has been so severe and pervasive that it is affecting their ability to concentrate, do their schoolwork, or attend classes. This means many victims may be forced to endure repeated and escalating levels of abuse before their complaint can be investigated. Rather than allowing schools to respond to all complaints of sexual harassment, the rule will require victims to first claim that their access to education has suffered as a result of the harassment before their school can investigate.

The revised sexual harassment definition will also create inconsistent requirements for sexual harassment relative to other categories of student or staff misconduct. The Department still requires schools to respond to harassment of students based on race, ethnicity, national origin, or disability under the more inclusive standard for creating a hostile educational environment, which is conduct that is “severe, pervasive, or persistent so as to *interfere with or limit* a student’s ability to participate in or benefit from the services.” Further, sexual harassment of individuals protected under both Title IX and Title VII, including students who are employed by their schools and school employees in both K-12 and higher education—will be subject to two conflicting standards given that employees, under Title VII standards, must only show that sexual harassment is severe or pervasive – not both as required by the Final Rule.

**f. Prohibits Schools from Investigating Many Complaints When the Victim Has Transferred, Graduated, or Been Pushed Out of School**

Under this new rule, students will only be able to file a sexual harassment complaint with a school where they are still “participating in or attempting to participate in the education program or activity” when they file the complaint.<sup>83</sup> This means that schools will not be allowed to investigate a complaint of sexual harassment—even if the respondent is still enrolled or teaching at the school—if the victim has already graduated, transferred, or dropped out because of the harassment if the victim doesn’t want to re-enroll or stay involved in alumni programs. Similarly, if a visiting high school student is sexually assaulted by a college student or a professor during an admit weekend, the survivor will not be able to file a complaint with that college unless they still wish to enroll there. This provision is particularly egregious given the

unequal power dynamic between students, on the one hand, and teachers, coaches, and administrators on the other. A student suffering from sexual harassment at the hands of a coach, for example, may be reluctant to file a formal complaint while the student remains a participant in the program led by the coach.

This rule will tie the hands of schools, preventing them from responding to known sexual harassment, including harassment by individuals who are still affiliated with the school and who could pose a risk of harm or assault to others.

**g. Allows Schools to Dismiss Complaints Because the Respondent Has Graduated, Transferred, or Retired**

Under the new rule, schools will be allowed to dismiss complaints—even during a pending investigation or hearing—because the respondent is no longer enrolled in or employed by their school.<sup>84</sup> This means if a student graduates or transfers to another school after sexually assaulting another student, the school will no longer have to investigate or provide supportive measures to help the survivor continue their education. Similarly, if a teacher retires or resigns after his sexual abuse of many students over several years comes to light, the school will no longer have to investigate to determine the scope of the abuse, the impact of the abuse on students, and whether other employees knew about the abuse but ignored it. Without such an investigation, the school will no longer be required to remedy the hostile environment for the survivors and possibly the broader school community, or take steps to prevent such abuse from happening again.

**h. Permits Schools to Unreasonably Delay an Investigation**

Previously, the Department of Education recommended that schools finish investigations within 60 days.<sup>85</sup> If there was an ongoing criminal investigation, schools were required to “promptly resume” the school’s investigation as soon as the police had finished gathering evidence—not wait for the ultimate outcome of the criminal investigation (which can take a very long time).<sup>86</sup>

The new rule allows schools to delay their own Title IX investigations for an unspecified period if there is an ongoing criminal investigation<sup>87</sup>—despite the fact that such investigations can be very lengthy. The new rule ignores the fact that Title IX is a civil rights law, not a criminal law, and that schools are required to conduct their own investigations *independent of the police*. The rule will make it particularly difficult for K-12 students who suffer sexual abuse to have a timely Title IX investigation, since most K-12 employees are required by state law to report child sexual abuse to the police,<sup>88</sup> which will trigger a criminal investigation. Student survivors have noted that many school investigations already take more than 180 days or even up to 519 days to resolve.<sup>89</sup>

**i. Establishes an Unfair Presumption of No Sexual Harassment:**

Under the new rule schools will be required to start all sexual harassment investigations with the presumption that no sexual harassment occurred<sup>90</sup>—even though no such presumption is

required for other school investigations of student or employee misconduct, like physical assault or religious harassment. In other words, schools will be effectively forced to presume that all students who report sexual harassment are lying. This presumption, which improperly imports a criminal law standard into a non-criminal school discipline process, perpetuates the sexist myth that women and girls frequently lie about sexual assault and other forms of sexual harassment. As state attorneys general and campus police officers pointed out when opposing the proposed rule, this requirement not only “improperly tilts the process” in favor of named sexual harassers<sup>91</sup> but also wrongly imports a criminal law presumption into non-criminal investigations.<sup>92</sup>

This presumption also conflicts with current Title IX regulations requiring “equitable” resolution of complaints;<sup>93</sup> a presumption in favor of one party against the other is plainly inequitable. Moreover, it conflicts with the Final Rule’s own requirement that “credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.”<sup>94</sup>

**j. Requires Retraumatizing Live Cross-Examination, Removes Schools’ Discretion Over Hearings, and Imposes Sweeping Exclusionary Rules of Relevant Evidence and Testimony**

In higher education, survivors and witnesses in sexual harassment investigations will be forced to submit to cross-examination “directly, orally, and in real time” by the respondent’s “advisor of choice” if they want any of their statements to be considered as evidence by the school.<sup>95</sup> The respondent’s advisor could be an angry parent or fraternity brother of the respondent, a faculty member who oversees the survivor’s academic work, or an “attack dog” criminal defense lawyer.

Although the Final Rule does not require live cross-examination for children in K-12 institutions, in part based on an acknowledgment that cross-examination is traumatizing and may not yield reliable results when minor children are involved, the Final Rule continues to require live cross-examination of minor children who are subject to sexual harassment, if that misconduct occurs in the context of a post-secondary institution. Thus, for example, the Final Rule will require that minor children attending summer programs or athletic or academic programs at post-secondary institutions, high school children taking classes at higher educational facilities, and even toddlers in daycares at higher educational institutions, be forced to submit to live cross-examination if they complain of sexual abuse by an adult classmate, professor, or daycare provider. There is no rational reason why the location of the harassment or assault, rather than the age of the complainant, should mandate that direct, live cross-examination is required. The Department declined to include any exception to live cross-examination for higher education investigations, even for minor children, though data shows that hostile, leading questions are not effective methods of eliciting accurate testimony from children.<sup>96</sup>

The Final Rule also requires schools to disregard as evidence all oral and written statements of any party or witness who declines to testify at a live hearing or who declines to answer every single question they receive during cross-examination.<sup>97</sup> This provision, which permits no exceptions, represents a sweeping exclusion of relevant evidence, far above and beyond the

Federal Rules of Evidence hearsay rules. Such mandatory evidentiary exclusions bear no relationship to the due process and truth-seeking goals that purport to animate them, and in fact, will only serve to reduce the quantum of relevant evidence that a school can consider in sexual harassment investigations. For example, if a survivor refuses or is unable to answer even a *single* cross-examination question—perhaps because it is too traumatizing—then the school will be required to disregard *all* of the survivor’s statements in the formal complaint, at the live hearing, and in all other written or oral evidence—even statements in a video of the incident clearly indicating that the survivor said “no.”<sup>98</sup> Similarly, if a police officer, nurse, or other witness is unavailable for cross examination, even if that is for a very good reason, then *none* of their previous written or oral statements in a police report, medical record, or text or email message can be considered as evidence by the school.<sup>99</sup> The Final Rule acknowledges that schools lack subpoena power, and further acknowledges that “witnesses also are not required to testify and may simply choose not to testify because the determination of responsibility usually does not directly impact, implicate or affect them.”<sup>100</sup> As a result, schools will frequently be forbidden from relying on relevant, probative evidence in sexual harassment investigations as a result of the fact that witnesses choose not to testify.

The Final Rule forbids college and graduate schools from designing procedures for hearings that account for the fact that the adversarial and contentious nature of cross-examination will further traumatize those who seek help to address sexual harassment and will discourage many students—both parties and witnesses—from participating in the sexual harassment grievance process. Over 900 mental health experts who specialize in trauma told the Department that subjecting a student survivor of sexual assault to cross-examination by their respondent’s advisor of choice was “almost guaranteed to aggravate their symptoms of post-traumatic stress,” and was “likely to cause serious harm to victims who complain and to deter even more victims from coming forward.”<sup>101</sup> According to the president of the Association of Title IX Administrators, the requirement of live cross-examination by a respondent’s advisor of choice, “even with accommodations like questioning from a separate room[,] would lead to a 50 percent drop in the reporting of misconduct.”<sup>102</sup> After the Final Rule was published, the American Psychological Association expressed disappointment in the Final Rule, stating that it was “concerned that provisions in the final rule could lead to underreporting of sexual misconduct, revictimization and/or traumatization of all parties involved,” specifying that those provisions included those “creating an adversarial system of resolving complaints similar to legal proceedings.”<sup>103</sup> The APA added that the Final Rule “lacks the foundation of psychological research and science needed to address acts of sexual misconduct on college campuses.”<sup>104</sup>

Neither the Constitution nor federal law requires cross-examination in public school proceedings and the majority of courts that have reached the issue have agreed that live cross-examination is not required in public school disciplinary proceedings, as long as there is a meaningful opportunity to have questions posed by a hearing examiner or some other neutral third party. Indeed, the Department “acknowledges that constitutional due process does not require the specific procedures included in the § 106.45 grievance process.”<sup>105</sup> Requiring live cross-examination under its Title IX regulations is contrary to Title IX’s mandate to prohibit sex

discrimination in schools, including sexual harassment and exceeds the Department's regulatory authority.

A requirement that schools conduct live, quasi-criminal trials with live cross-examination only in sexual misconduct investigations—and not in investigations of other types of student or staff misconduct—communicates the toxic and false message that allegations of sexual harassment are uniquely unreliable. In sum, the Rule ensures that many student survivors will be retraumatized or deterred from coming forward at all, and that many witnesses will refuse to participate in investigatory processes.

#### **k. Requires a Standard of Proof Unfair to Complainants**

Previously, schools were required to use a “preponderance of the evidence” standard (i.e., “more likely than not”) in all sexual harassment investigations.<sup>106</sup> This is the same standard that is used by courts in all civil rights cases<sup>107</sup> and is the only standard of proof<sup>108</sup> that treats both sides equally.

Under the new rule, schools will be able to choose between using the preponderance standard or the much higher standard of “clear and convincing evidence” (i.e., “*highly and substantially* more likely than not”) to determine responsibility for sexual harassment, as long as they use the same standard against student and staff respondents.<sup>109</sup> Because some school employees' collective bargaining agreements require use of the “clear and convincing evidence” standard for all employee misconduct investigations, some schools will thus be required to use the “clear and convincing evidence” standard in student sexual harassment investigations, even if they continue to use the preponderance standard for all other investigations of student misconduct, like a fist fight or religious harassment.

The Final Rule is a departure from at least twenty-five years of Department policy in both Republican and Democratic administrations requiring schools to use the preponderance standard to determine whether sexual harassment occurred.<sup>110</sup> It is also a departure from the use of the preponderance standard in campus sexual assault proceedings by the vast majority of educational institutions over the past two decades.<sup>111</sup> Allowing schools to use a “clear and convincing evidence” standard that tilts the scales in favor of respondents and to apply this standard only in sexual harassment investigations is inequitable and discriminatory.

#### **l. Allows for Inappropriate and Harmful Mediation to Resolve Sexual Assault Complaints**

Previously, schools were prohibited from using mediation to resolve sexual assault complaints,<sup>112</sup> because mediation assumes both parties share responsibility for the assault, because mediation can allow assailants to pressure survivors into inappropriate resolutions, and because mediation often requires direct interaction between the assailant and survivor, which can be retraumatizing. Under the new rule, schools will be allowed to use mediation to resolve any complaint of student-on-student sexual harassment, including sexual assault, domestic violence, dating violence, and stalking.<sup>113</sup> Students, survivors, and advocates alike

opposed this rule when it was proposed because mediation can “foster coercion,” allows abusers to manipulate victims,<sup>114</sup> and allows students to be “pressured by administrators” into entering mediation.<sup>115</sup>

#### **m. Prohibits Many Supportive Measures for Victims of Sexual Harassment**

Supportive measures (or “interim measures”) are reasonable steps that schools are required to take—before, during, or without an investigation—to ensure that sexual harassment does not interfere with a student’s education. Supportive measures can include changes to class schedules or housing assignments to separate the students, counseling services, tutoring services, excused absences, or changes in assignments and tests.<sup>116</sup> Previously, schools were instructed to minimize the burden of these measures on the complainant.<sup>117</sup>

Under the new rule, schools will only be required to provide supportive measures to complainants whose complaints are not dismissed and will be prohibited from providing supportive measures that are “disciplinary,” “punitive,” or that “unreasonably burden” the other party.<sup>118</sup> This may lead some schools to impose *mutual* no-contact orders, which puts victims at risk of discipline, given that abusers often manipulate victims into violating mutual no-contact orders.<sup>119</sup> This could also mean that some schools will force victims to change their own classes and dorms to avoid their rapist or abuser, because they mistakenly believe that any changes to the respondent’s schedule will be seen as unreasonably burdensome.<sup>120</sup> This is a sharp departure from the policy spanning the entire history of Title IX regulation: that schools were required to provide such measures that would enable a complainant to retain access to educational opportunities, not to prevent the respondent from being inconvenienced.

#### **n. Includes a Retaliation Provision That Could Be Harmful to Complainants**

The Final Rule allows schools to discipline survivors for making a “materially false statement in bad faith” without it being considered retaliation under Title IX, as long as the decision to discipline is not based solely on the outcome of an investigation. The threat of discipline if a school determines an accusation is “false” will deter many survivors from coming forward to ask for help or initiate an investigation. This provision will especially harm women and girls of color (particularly Black girls who already face discriminatory discipline<sup>121</sup>), pregnant and parenting students, LGBTQ students, and students with disabilities, who are already more likely to be disbelieved and blamed due to rape myths and stereotypes that label them as more promiscuous, aggressive, and/or less credible.

#### **o. Purports to Preempt State and Local Laws That Provide Greater Protections Against Sexual Harassment**

The Final Rule claims to preempt any state or local law to the extent that there is a conflict. This means that even if schools are required by state or local law to provide stronger protections for victims of sexual harassment, they will be prohibited from doing so to the extent that such protections conflict with the Final Rule.

For example, state and local laws that require schools to investigate complaints of sexual harassment that: (i) fall short of the Final Rule’s narrow definition of harassment, (ii) occur outside of a school program or activity or in a school program or activity outside of the United States, or (iii) are filed by a complainant who is no longer participating in the school’s program or activity are purportedly preempted by the Final Rule.

Even if a complainant is able to survive the Final Rule’s stringent dismissal rules and is able to initiate a Title IX investigation, their school will be prohibited from following state or local laws providing certain types of protections in investigation procedures. For example, schools will be prohibited from: (i) making no presumptions about the respondent’s responsibility, (ii) allowing parties in higher education to ask questions of each other through a neutral third party, (iii) allowing parties and witnesses in postsecondary proceedings to submit written or oral evidence without being subjected to cross-examination at a live hearing, (iv) excluding cross-examination questions that are misleading or unduly prejudicial or that relate to a complainant’s “dating or romantic” history, or (v) applying a preponderance of the evidence standard in student investigations where staff investigations are required by a collective bargaining agreement to use a more burdensome standard.

By creating a ceiling on the protections from sexual harassment that states and localities can provide to students and employees who are sexually harassed, the Final Rule radically departs from the longstanding interpretations of Title IX and other federal civil rights laws, as providing merely a floor of protection from discrimination upon which states and local governments are able to create additional protections.

**p. Allows Religious Schools a License to Discriminate on the Basis of Sex Without Notice to Students**

Under the previous Rule, religious schools were able to claim religious exemptions from particular Title IX requirements by notifying the Department in writing and identifying which Title IX provisions conflict with their religious beliefs. Under the new rule, the Department of Education is assuring schools that they will not be required to give the Department notice they are claiming a religious exemption from Title IX, or give students or their families any notice that they are claiming a religious exemption, *before* they engage in sex discrimination.<sup>122</sup> Schools can simply assert a religious exemption *after* they are already under investigation for violating Title IX.<sup>123</sup>

Additionally, in another Title IX rule that was published earlier this year,<sup>124</sup> DeVos has proposed expanding the religious exemption to allow many more schools to discriminate based on sex in the name of religion.<sup>125</sup> This new proposed rule would allow schools that have only a tangential relationship—or even no relationship—to religion to claim a right to discriminate simply because they subscribe to “moral beliefs or practices.”<sup>126</sup> This means that in DeVos’s view, a school could assert a license to discriminate in violation of Title IX based on not only moral principles that often have religious undertones like “modesty” or “purity,” but also common secular principles like “fairness,” “honesty,” or “intellectual freedom.”<sup>127</sup> These two Title IX



rules, separately and together, will be especially dangerous for women and girls, LGBTQ students, pregnant or parenting students, and students who access or attempt to access birth control or abortion.

## V. Conclusion

The Department's Title IX Final Rule ignores the devastating impacts of sexual harassment, imports inappropriate legal standards into agency enforcement, relies on sexist stereotypes about survivors, and imposes procedural requirements that force schools to tilt their Title IX investigation processes in favor of respondents to the detriment of survivors and other harassment victims. It will make schools more dangerous for all students, with especial risk to students experiencing sexual harassment who are students of color, pregnant and parenting students, LGBTQ students, and/or students with disabilities, as they are more likely to experience sexual harassment and more likely to be ignored, punished, and pushed out of school entirely. Simultaneously, schools would be forced to adopt inflexible, costly, and ineffective procedures that would expose them to more litigation and that create less inclusive and equitable communities.<sup>128</sup> The Final Rule conflicts with the letter and purpose of Title IX; it is not only dangerous, it is illegal.

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<sup>1</sup> E.g., *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005); *Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629 (1999).

<sup>2</sup> Dana Bolger, *Where Rape Gets a Pass*, N.Y. DAILY NEWS (July 6, 2014), <http://www.nydailynews.com/opinion/rape-pass-article-1.1854420> ("In 2011, my sophomore year of college, I was raped and then stalked by a fellow student. When I went to report my assault to my college dean, he encouraged me to take time off, go home, be "safe," focus on my own healing, and put my education on hold - so that the man who raped me could comfortably conclude his.").

<sup>3</sup> Anonymous, *On Assault Narratives*, YALE DAILY NEWS (Feb. 1, 2010), <http://yaledailynews.com/blog/2012/02/01/anonymous-on-assault-narratives/>.

<sup>4</sup> Angie Epifano, *An Account of Sexual Assault at Amherst College*, AMHERST STUDENT (Oct. 17, 2012), <http://amherststudent.amherst.edu/?q=article/2012/10/17/account-sexual-assault-amherst-college>.

<sup>5</sup> We use the terms "victim" and "survivor" interchangeably to acknowledge students' range of responses to violence. For critiques of the limiting function of either term, see Dana Bolger, "Hurry Up and Heal": Pain, Productivity, and the Inadequacy of "Victim vs. Survivor", *Feministing.com* (Dec. 10, 2014), <http://feministing.com/2014/12/10/hurry-up-and-heal-pain-productivity-and-the-inadequacyof-victim-vs-survivor/>; Parul Sehgal, *The Forced Heroism of the 'Survivor'*, N.Y. Times Mag., May 3, 2016, [http://www.nytimes.com/2016/05/08/magazine/the-forced-heroism-of-the-survivor.html?\\_r=0](http://www.nytimes.com/2016/05/08/magazine/the-forced-heroism-of-the-survivor.html?_r=0).

<sup>6</sup> Annie-Rose Strasser, *University of North Carolina rape victim may be expelled for speaking about her case*, THINKPROGRESS (Feb. 23, 2013), <https://thinkprogress.org/university-of-north-carolina-rape-victim-may-be-expelled-for-speaking-about-her-case-2d6e6b0eb24e>.

<sup>7</sup> See generally Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 YALE L.J. 2106 (2016) (describing the financial impact of gender violence on student survivors).

<sup>8</sup> Libby Sander, "Quiet no longer, rape survivors put pressure on colleges," *the Chronicle of Higher Education* (Aug. 12, 2013), <http://www.chronicle.com/article/Quiet-No-Longer-Rape/141049>.

<sup>9</sup> Alyssa Peterson & Olivia Ortiz, *A Better Balance: Providing Survivors of Sexual Violence with "Effective Protection" Against Sex Discrimination Through Title IX Complaints*, 125 YALE L.J. 2132, 2138-39 (2016); Robin Wilson, *2014 Influence List: Enforcer*, *Chronicle of Higher Education* (Dec. 15, 2014), available at

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<http://www.chronicle.com/article/enforcer-catherine-e-lhamon/150837> (describing Assistant Secretary for Civil Rights' Catherine Lhamon's efforts to strengthen OCR's Title IX enforcement).

<sup>10</sup> Letter from the National Women's Law Center, *et al.* to Education Secretary John King (July 13, 2016), *available at* <https://nwl.org/resources/sign-on-letter-supporting-title-ix-guidance-enforcement/> ("These guidance documents and increased enforcement of Title IX by the Office for Civil Rights have spurred schools to address cultures that for too long have contributed to hostile environments which deprive many students of equal educational opportunities.").

<sup>11</sup> Am. Ass'n of Univ. Women (AAUW), *Crossing the Line: Sexual Harassment at School 2* (2011) [hereinafter *Crossing the Line*], <https://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf>.

<sup>12</sup> Nat'l Women's Law Ctr., *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence 1* (Apr. 2017) [hereinafter *Let Her Learn: Sexual Harassment and Violence*], *available at* <https://nwl.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence/>.

<sup>13</sup> Ass'n of Am. Univ., *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, at ix (Oct. 15, 2019), <https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019>.

<sup>14</sup> Nat'l Women's Law Ctr., *Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting* at 12 (2017) [hereinafter *Let Her Learn: Pregnant or Parenting Students*], *available at* [https://nwl-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/04/Final\\_nwl\\_Gates\\_PregParenting.pdf](https://nwl-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/04/Final_nwl_Gates_PregParenting.pdf).

<sup>15</sup> Nat'l Women's Law Ctr., *Let Her Learn: Stopping School Pushout for Girls Who Have Experienced Sexual Harassment* at 3 (2018) [hereinafter *Let Her Learn: Sexual Harassment*], *available at* <https://nwl-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/10/2018-10-01-SH-toolkit-FINAL.pdf>.

<sup>16</sup> GLSEN, *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools 26* (2018) [hereinafter 2017 National School Climate Survey], *available at* <https://www.glsen.org/sites/default/files/2019-10/GLSEN-2017-National-School-Climate-Survey-NSCS-Full-Report.pdf>.

<sup>17</sup> *AAU Campus Climate Survey*, *supra* note 13, at 13-14.

<sup>18</sup> Nat'l Women's Law Ctr., *Let Her Learn: Stopping School Pushout for Girls With Disabilities 7* (2017) [hereinafter *Let Her Learn: Girls with Disabilities*], *available at* <https://nwl.org/resources/stopping-school-pushout-for-girls-with-disabilities>.

<sup>19</sup> *E.g.*, Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, VICE (Sept. 26, 2017), [https://broadly.vice.com/en\\_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus](https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus).

<sup>20</sup> *E.g.*, Alexandra Brodsky, *How much does sexual assault cost college students every year?*, WASH. POST (Nov. 18, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/11/18/how-much-does-sexual-assault-cost-students-every-year>.

<sup>21</sup> Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18(2) J.C. STUDENT RETENTION: RES., THEORY & PRAC. 234, 244 (2015), *available at* <https://doi.org/10.1177/1521025115584750>.

<sup>22</sup> Nick Anderson and Scott Clement, *College Sexual Assault: 1 in 5 College Women Say They Were Violated*, WASH. POST (June 12, 2015) [hereinafter Washington Post Poll], <https://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated/>.

<sup>23</sup> *Let Her Learn: Sexual Harassment*, *supra* note 15 at 2.

<sup>24</sup> *AAU Campus Climate Survey*, *supra* note 13 at 36.

<sup>25</sup> *Id.*

<sup>26</sup> RAINN, *Campus Sexual Violence: Statistics*, <https://www.rainn.org/statistics/campus-sexual-violence>.

<sup>27</sup> 2017 National School Climate Survey, *supra* note 16, at 27.

<sup>28</sup> See Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, N.Y. TIMES (April 30, 2017), <https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html?mcubz=3>.

<sup>29</sup> National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey: Executive Summary 12* (Dec. 2016) [hereinafter 2015 U.S. Transgender Survey], <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>.

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<sup>30</sup> See e.g., Bethonie Butler, *Survivors of sexual assault confront victim blaming on Twitter*, WASH. POST (Mar. 13, 2014), <https://www.washingtonpost.com/blogs/she-the-people/wp/2014/03/13/survivors-of-sexual-assault-confront-victim-blaming-on-twitter>.

<sup>31</sup> David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16(12) VIOLENCE AGAINST WOMEN 1318–1334 (2010), available at <https://doi.org/10.1177/1077801210387747>.

<sup>32</sup> E.g., Tyler Kingkade, *Males Are More Likely To Suffer Sexual Assault Than To Be Falsely Accused Of It*, HUFFINGTON POST (Dec. 8, 2014) [last updated Oct. 16, 2015], [https://www.huffingtonpost.com/2014/12/08/false-rape-accusations\\_n\\_6290380.html](https://www.huffingtonpost.com/2014/12/08/false-rape-accusations_n_6290380.html).

<sup>33</sup> See, e.g., Brian Entin, *Miami Gardens 9th-grader says she was raped by 3 boys in school bathroom*, WSVN-TV (Feb. 8, 2018), <https://wsvn.com/news/local/miami-gardens-9th-grader-says-she-was-raped-by-3-boys-in-school-bathroom>; Nora Caplan-Bricker, *“My School Punished Me”*, SLATE (Sept. 19, 2016), <https://slate.com/human-interest/2016/09/title-ix-sexual-assault-allegations-in-k-12-schools.html>; Aviva Stahl, *‘This Is an Epidemic’: How NYC Public Schools Punish Girls for Being Raped*, VICE (June 8, 2016), [https://broadly.vice.com/en\\_us/article/59mz3x/this-is-an-epidemic-how-nyc-public-schools-punish-girls-for-being-raped](https://broadly.vice.com/en_us/article/59mz3x/this-is-an-epidemic-how-nyc-public-schools-punish-girls-for-being-raped).

<sup>34</sup> Sarah Brown, *BYU Is Under Fire, Again, for Punishing Sex-Assault Victims*, CHRONICLE OF HIGHER EDUC. (Aug. 6, 2018), <https://www.chronicle.com/article/BYU-Is-Under-Fire-Again-for/244164>.

<sup>35</sup> NAACP Legal Defense and Educ. Fund, Inc. & Nat’l Women’s Law Ctr., *Unlocking Opportunity for African American Girls: A Call to Action for Educational Equity* 25 (2014) [hereinafter *Unlocking Opportunity*], [https://nwlc.org/wp-content/uploads/2015/08/unlocking\\_opportunity\\_for\\_african\\_american\\_girls\\_report.pdf](https://nwlc.org/wp-content/uploads/2015/08/unlocking_opportunity_for_african_american_girls_report.pdf).

<sup>36</sup> See, e.g., Tyler Kingkade, *When Colleges Threaten To Punish Students Who Report Sexual Violence*, HUFFINGTON POST (Sept. 9, 2015), [https://www.huffingtonpost.com/entry/sexual-assault-victims-punishment\\_us\\_55ada33de4b0caf721b3b61c](https://www.huffingtonpost.com/entry/sexual-assault-victims-punishment_us_55ada33de4b0caf721b3b61c).

<sup>37</sup> For example, NWLC recently litigated on behalf of three student survivors who were punished or otherwise unfairly pushed out of their high schools when they reported sexual harassment, including sexual assault. Nat’l Women’s Law Ctr., *Miami School Board Pushed Survivor of Multiple Sexual Assaults Out of School, Says NWLC* (Jan. 15, 2019), <https://nwlc.org/press-releases/miami-school-board-pushed-survivor-of-multiple-sexual-assaults-out-of-school-says-nwlc>; Nat’l Women’s Law Ctr., *Pennridge School District Consistently Pushes Survivors of Sexual Harassment Out of School, Says NWLC* (Aug. 9, 2017), <https://nwlc.org/press-releases/pennridge-school-district-consistently-pushes-survivors-of-sexual-harassment-out-of-school-says-nwlc>; Nat’l Women’s Law Ctr., *NWLC Files Lawsuit against PA School District for Failing to Address Sexual Assault of High School Student* (May 31, 2017), <https://nwlc.org/press-releases/nwlc-files-lawsuit-against-pa-school-district-for-failing-to-address-sexual-assault-of-high-school-student>.

<sup>38</sup> Nat’l Women’s Law Ctr., *Let Her Learn: A Toolkit To Stop School Pushout for Girls of Color* 1 (2016) [hereinafter *Let Her Learn: Girls of Color*], available at <https://nwlc.org/resources/let-her-learn-a-toolkit-to-stop-school-push-out-for-girls-of-color>.

<sup>39</sup> E.g., Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARVARD J.L. & GENDER 16, 24-29 (forthcoming), available at <https://ssrn.com/abstract=3168909>.

<sup>40</sup> Georgetown Law Center on Poverty and Inequality, *Girlhood Interrupted: The Erasure of Black Girls’ Childhood*, 1 (2018) [hereinafter *Girlhood Interrupted*], <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf>.

<sup>41</sup> Cantalupo, *supra* note 39, at 24-25.

<sup>42</sup> *Girlhood Interrupted*, *supra* note 40, at 2-6.

<sup>43</sup> For example, The Department’s 2013-14 Civil Rights Data Collection (CRDC) shows that Black girls are five times more likely than white girls to be suspended in elementary and secondary school, and that while Black girls represented 20 percent of all preschool enrolled students, they were 54 percent of preschool students who were suspended. U.S. Dep’t of Education, Office for Civil Rights, *A First Look: Key Data Highlights on Equity and Opportunity Gaps in Our Nation’s Public Schools*, at 3 (June 7, 2016; last updated Oct. 28, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>.

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<sup>44</sup> See, e.g., Gillian R. Chadwick, *Reorienting the Rules of Evidence*, 39 CARDOZO L. REV. 2115, 2118 (2018), <http://cardozolawreview.com/heterosexism-rules-evidence>; Laura Dorwart, *The Hidden #MeToo Epidemic: Sexual Assault Against Bisexual Women*, MEDIUM (Dec. 3, 2017), <https://medium.com/@lauramdorwart/the-hidden-metoo-epidemic-sexual-assault-against-bisexual-women-95fe76c3330a>.

<sup>45</sup> The Arc, *People with Intellectual Disabilities and Sexual Violence* 2 (Mar. 2011), available at <https://www.thearc.org/document.doc?id=3657>.

<sup>46</sup> E.g., Nat'l Inst. of Justice, *Examining Criminal Justice Responses to and Help-Seeking Patterns of Sexual Violence Survivors with Disabilities* 11, 14-15 (2016), available at <https://www.nij.gov/topics/crime/rape-sexual-violence/Pages/challenges-facing-sexual-assault-survivors-with-disabilities.aspx>.

<sup>47</sup> 62 Fed. Reg. 12,034 (Mar. 13, 1997) ("1997 Guidance").

<sup>48</sup> See *Davis v. Monroe Cty Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

<sup>49</sup> *Gebser*, 524 U.S. at 292.

<sup>50</sup> See U.S. Dep't of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001) [hereinafter 2001 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

<sup>51</sup> These standards have been reaffirmed time and time again, in 2006 by the Bush Administration, in 2010, 2011, and 2014 in guidance documents issued by the Obama Administration, and even in the 2017 guidance document issued by the current Administration. U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Sexual Harassment* (Jan. 25, 2006) [hereinafter 2006 Guidance], <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>; U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010) [hereinafter 2010 Guidance], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* at 4, 6, 9, &16 (Apr. 4, 2011) [hereinafter 2011 Guidance], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* 1-2 (Apr. 29, 2014) [hereinafter 2014 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Campus Sexual Misconduct* (Sept. 2017) [hereinafter 2017 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

<sup>52</sup> 2001 Guidance, *supra* note 50.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> 2011 Guidance, *supra* note 51; 2014 Guidance, *supra* note 51.

<sup>56</sup> Dep't of Educ., *Secretary DeVos Prepared Remarks on Title IX Enforcement* (Sept. 7, 2017) [hereinafter *DeVos Prepared Remarks*], available at <https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement>.

<sup>57</sup> Erica L. Green & Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear*, N.Y. TIMES (July 12, 2017), <https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-ix-education-trump-candice-jackson.html>.

<sup>58</sup> When White House officials Rob Porter and David Sorensen resigned amidst reports that they had committed gender-based violence, the president tweeted: "Peoples [sic] lives are being shattered and destroyed by a mere allegation. ... There is no recovery for someone falsely accused—life and career are gone. Is there no such thing any longer as Due Process?" Donald Trump (@realDonaldTrump), TWITTER (Feb. 10, 2018, 7:33 AM), <https://twitter.com/realDonaldTrump/status/962348831789797381>. See also Jacey Fortin, *Trump's History of Defending Men Accused of Hurting Women*, N.Y. TIMES (Feb. 11, 2018), <https://www.nytimes.com/2018/02/11/us/trump-sexual-misconduct.html> (about harassment claims against former Fox News host, Bill O'Reilly, Trump said: "I don't think Bill did anything wrong," adding, "I think he's a person I know well. He is a good person," and about sexual harassment claims against former chairman of Fox News, Roger Ailes, Trump said he "felt very badly" for him and that "I can tell you that some of the women that are complaining, I know how much he's helped them."); Lisa Bonos, *Trump asks why Christine Blasey Ford didn't report her allegations sooner. Survivors answer with #WhyIDidntReport*, WASH. POST (Sept. 21, 2018),

[https://www.washingtonpost.com/news/soloish/wp/2018/09/21/trump-asks-why-christine-blasey-ford-didnt-report-her-allegation-sooner-survivors-answer-with-whyididntreport/?utm\\_term=.3ca0d0017c36](https://www.washingtonpost.com/news/soloish/wp/2018/09/21/trump-asks-why-christine-blasey-ford-didnt-report-her-allegation-sooner-survivors-answer-with-whyididntreport/?utm_term=.3ca0d0017c36) (about sexual assault claims against Justice Brett Kavanaugh, Trump doubted Dr. Ford’s account, stating “if the attack on Dr. Ford was as bad as she says, charges would have been immediately filed with local Law Enforcement Authorities”); Allie Malloy, et al., *Trump Mocks Christine Blasey Ford’s Testimony, Tells People to ‘Think of Your Son’*, CNN (Oct. 3, 2018), <https://www.cnn.com/2018/10/02/politics/trump-mocks-christine-blasey-ford-kavanaugh-supreme-court/index.html> (reporting on Trump mocking Dr. Ford’s testimony before the Senate Judiciary Committee);

<sup>59</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (Nov. 29, 2018).

<sup>60</sup> White House Council on Women and Girls, *Rape and Sexual Assault: A Renewed Call to Action* 15 (Jan. 2014), [https://www.knowyourix.org/wp-content/uploads/2017/01/sexual\\_assault\\_report\\_1-21-14.pdf](https://www.knowyourix.org/wp-content/uploads/2017/01/sexual_assault_report_1-21-14.pdf).

<sup>61</sup> Inst. for Women’s Policy Research, *Dreams Deferred: A Survey on the Impact of Intimate Partner Violence on Survivors’ Education, Careers, and Economic Security* 8 (2018), [https://iwpr.org/wp-content/uploads/2018/10/C474\\_IWPR-Report-Dreams-Deferred.pdf](https://iwpr.org/wp-content/uploads/2018/10/C474_IWPR-Report-Dreams-Deferred.pdf).

<sup>62</sup> Cora Peterson et al., *Lifetime Economic Burden of Rape Among U.S. Adults*, 52(6) AM. J. PREV. MED. 691, 698, (2017), available at [https://stacks.cdc.gov/view/cdc/45804/cdc\\_45804\\_DS1.pdf](https://stacks.cdc.gov/view/cdc/45804/cdc_45804_DS1.pdf).

<sup>63</sup> Feminist Majority Foundation, *Fast facts - Sexual violence on campus* (2018), <http://feministcampus.org/wp-content/uploads/2018/11/Fast-Facts.pdf>.

<sup>64</sup> 2001 Guidance, *supra* note 50, at 15–16.

<sup>65</sup> 34 C.F.R. § 106.44(a); *see also* § 106.44(b)(2).

<sup>66</sup> 2001 Guidance, *supra* note 50, at 15–16.

<sup>67</sup> Proposed Rule at 61,468, 61,469 (citing *Gebser*, 524 U.S. at 292); *see also Davis*, 526 U.S. at 639 (distinguishing “the scope of the behavior that Title IX proscribes” from behavior that “can support a private suit for money damage”).

<sup>68</sup> 2001 Guidance, *supra* note 50, at 10, 12, 13.

<sup>69</sup> *Id.* at 13.

<sup>70</sup> 34 C.F.R. § 106.30(a) (defining “actual knowledge”); *see also* § 106.44(a).

<sup>71</sup> Letter from 21 Ohio State University Survivors to Betsy DeVos, Sec’y, Dep’t of Educ., and Kenneth L. Marcus, Ass’t Sec’y for Civil Rights, Dep’t of Educ., at 3 (Jan. 30, 2019), <https://www.publicjustice.net/wp-content/uploads/2019/01/Comments-of-Ohio-State-Survivors-on-Title-IX-NPRM.pdf>; Letter from 82 Student Survivors of Larry Nassar at Michigan State University, George Tyndall at University of Southern California, and Richard Strauss at Ohio State University to Betsy DeVos, Sec’y, Dep’t of Educ., and Kenneth L. Marcus, Ass’t Sec’y for Civil Rights, Dep’t of Educ., at 2 (Nov. 1, 2018), <https://www.publicjustice.net/wp-content/uploads/2018/11/November-1-Survivor-Letter-to-ED.pdf>.

<sup>72</sup> 2014 Guidance, *supra* note 51, at 18–24; 2011 Guidance, *supra* note 51, at 5; 2001 Guidance, *supra* note 50, at 17, 18.

<sup>73</sup> § 106.30(a) (defining “formal complaint”). *See also* 85 Fed. Reg. at 30,122 n.547.

<sup>74</sup> 2017 Guidance, *supra* note 51, at 1 n.3; 2014 Guidance, *supra* note 51, at 29; 2011 Guidance, *supra* note 51, at 4; 2001 Guidance, *supra* note 50, at 5.

<sup>75</sup> Although the Department has “clarified” that “dismissal of a formal complaint because the allegations do not meet the Title IX definition of sexual harassment, does not preclude a recipient from addressing the alleged misconduct under other provisions of the recipient’s own code of conduct,” this so-called clarification creates even more confusion. *See* 85 Fed. Reg. at 30,037–38. Permitting the use of other grievance procedures under a school’s code of conduct creates uncertainty for complainants and respondents alike, as well as potential liability for schools if their classification of conduct as outside of the definition of sexual harassment is challenged.

<sup>76</sup> 34 C.F.R. §§ 106.44(a), 106.45(b)(3)(i).

<sup>77</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, *Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013* at 6 (Dec. 2014), <https://perma.cc/8VZL-H6F5>.

<sup>78</sup> Rochelle Sharpe, *How Much Does Living Off-Campus Cost? Who Knows?*, N.Y. Times (Aug. 5, 2016), <https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html> (87 percent).

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<sup>79</sup> United Educators, *Facts From United Educators' Report - Confronting Campus Sexual Assault: An Examination of Higher Education Claims* (2015), [https://www.ue.org/sexual\\_assault\\_claims\\_study](https://www.ue.org/sexual_assault_claims_study).

<sup>80</sup> Crossing the Line, *supra* note 11, at 8.

<sup>81</sup> 2001 Guidance, *supra* note 50, at 2.

<sup>82</sup> 34 C.F.R. § 106.30(a) (defining “sexual harassment”); *see also* § 106.45(b)(3)(i). Note: The new rule does *not* create new Title IX protections against domestic violence, dating violence, and stalking. Title IX prohibits all forms of *sexual* harassment, which includes non-sexual conduct associated with domestic violence, dating violence, and stalking.

<sup>83</sup> 34 C.F.R. § 106.30(a) (defining “formal complaint”).

<sup>84</sup> § 106.45(b)(3)(ii).

<sup>85</sup> 2014 Guidance, *supra* note 51, at 31-32; 2011 Guidance, *supra* note 51, at 12.

<sup>86</sup> 2014 Guidance, *supra* note 51, at 28; 2011 Guidance, *supra* note 51, at 10. *See also* 2001 Guidance, *supra* note 54, at 21 (“because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively”).

<sup>87</sup> 34 C.F.R. § 106.45(b)(1)(v).

<sup>88</sup> *See* Dep’t of Health & Human Servs., Admin. for Children & Families, Child Welfare Info. Gateway, *Mandatory Reporters of Child Abuse and Neglect* (2019), <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/manda>.

<sup>89</sup> Letter from Know Your IX to Kenneth L. Marcus, Ass’t Sec’y for Civil Rights, Dep’t of Educ., at 42-46 (Jan. 30, 2019) [hereinafter Letter from Know Your IX], [https://actionnetwork.org/user\\_files/user\\_files/000/029/219/original/Know\\_Your\\_IX\\_Comment\\_on\\_Proposed\\_Title\\_IX\\_Rule\\_\(1\).pdf](https://actionnetwork.org/user_files/user_files/000/029/219/original/Know_Your_IX_Comment_on_Proposed_Title_IX_Rule_(1).pdf).

<sup>90</sup> 34 C.F.R. § 106.45(b)(1)(iv).

<sup>91</sup> Letter from 20 Attorneys General to Betsy DeVos, Sec’y, Dep’t of Educ., at 35 (July 19, 2017), <https://www.attorneygeneral.gov/taking-action/press-releases/20-ags-call-on-secretary-devos-to-maintain-protections-for-survivors-of-campus-sexual-assault>.

<sup>92</sup> Letter from Int’l Ass’n of Campus Law Enforcement Administrators to Betsy DeVos, Sec’y, Dep’t of Educ., at 6 (Jan. 28, 2019) (“International Association of Campus Law Enforcement Administrators’ Comment”), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10515>.

<sup>93</sup> § 106.8(c).

<sup>94</sup> § 106.45(b)(1)(ii).

<sup>95</sup> 34 C.F.R. § 106.45(b)(6)(i).

<sup>96</sup> Rhiannon Fogliati & Kay Bussey, *The Effects of Cross-Examination on Children’s Coached Reports*, 21 *Psychology, Pub. Policy, & L.* 10 (2015) (cross-examination led children to recant their initial true allegations of witnessing transgressive behavior and significantly reduced children’s testimonial accuracy for neutral events); Saskia Righarts et al., *Young Children’s Responses to Cross-Examination Style Questioning: The Effects of Delay and Subsequent Questioning*, 21(3) *Psychology, Crime & L.* 274 (2015) (cross-examination resulted in a “robust negative effect on children’s accuracy”; only 7% of children’s answers improved in accuracy); Fiona Jack and Rachel Zajac, *The Effect of Age and Reminders on Witnesses’ Responses to Cross-Examination-Style Questioning*, 3 *J. of Applied Research in Memory and Cognition* 1 (2014) (“adolescents’ accuracy was also significantly affected” by cross-examination-style questioning); Rhiannon Fogliati & Kay Bussey, *The Effects of Cross-Examination on Children’s Reports of Neutral and Transgressive Events*, 19 *Legal & Crim. Psychology* 296 (2014) (cross-examination led children to provide significantly less accurate reports for neutral events and actually reduced the number of older children who provided truthful disclosures for transgressive events); Joyce Plotnikoff & Richard Woolfson, *‘Kicking and Screaming’: The Slow Road to Best Evidence*, in *Children and Cross-Examination: Time to Change the Rules?* 21, at 27 (John Spencer & Michael Lamb eds. 2012) (a hostile accusation that a child is lying “can cause a child to give inaccurate answers or to agree with the suggestion that they are lying simply to bring questioning to an end”).

<sup>97</sup> § 106.45(b)(6)(i).

<sup>98</sup> 85 Fed. Reg. at 30,346, 30,347, 30,349.

<sup>99</sup> *Id.* at 30,349.

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<sup>100</sup> *Id.* at 30,356.

<sup>101</sup> Letter from 902 Mental Health Professionals and Trauma Specialists to Kenneth L. Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ., at 4-5 (Jan. 30, 2019) ("Letter from 902 Mental Health Professionals and Trauma Specialists"), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-104088>.

<sup>102</sup> Andrew Kreighbaum, *New Uncertainty on Title IX*, INSIDE HIGHER EDUCATION (Nov. 20, 2018).

<sup>103</sup> Press Release, Am. Psychological Ass'n, More Difficult to File Claims of Campus Sexual Assault Under New Education Dept. Title IX Rule (May 6, 2020), [https://www.apa.org/news/press/releases/2020/05/campus-sexual-assault?utm\\_source=facebook&utm\\_medium=social&utm\\_campaign=apa-press-release&utm\\_content=title-ix-statement-may6](https://www.apa.org/news/press/releases/2020/05/campus-sexual-assault?utm_source=facebook&utm_medium=social&utm_campaign=apa-press-release&utm_content=title-ix-statement-may6).

<sup>104</sup> *Id.*

<sup>105</sup> 85 Fed. Reg. at 30,053.

<sup>106</sup> 2014 Guidance, *supra* note 51, at 13, 26; 2011 Guidance, *supra* note 51, at 10-11.

<sup>107</sup> Letter from Leadership Conference on Civil and Human Rights to Kenneth L. Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ., at 7 (Jan. 30, 2019) [hereinafter Letter from Leadership Conference on Civil and Human Rights], <http://civilrightsdocs.info/pdf/policy/letters/2019/Joint-Comment-Title-IX-NPRM-01302019-Final.pdf>.

<sup>108</sup> Letter from National Women's Law Center to Kenneth L. Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ., at 33 (Jan. 30, 2019) [hereinafter Letter from National Women's Law Center], <https://nwlc-ciaw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/02/NWLC-Title-IX-NPRM-Comment.pdf>.

<sup>109</sup> 34 C.F.R. § 106.45(b)(1)(vii).

<sup>110</sup> See, e.g., 2003 OCR Letter to Georgetown University, at 1; 1995 OCR letter to Evergreen College, at 8.

<sup>111</sup> Heather M. Karjane, et al., *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 120 (2002).

<sup>112</sup> 2011 Guidance, *supra* note 51, at 8; 2001 Guidance, *supra* note 50, at 21.

<sup>113</sup> 34 C.F.R. § 106.45(b)(9).

<sup>114</sup> Know Your IX, *supra* note 89, at 39.

<sup>115</sup> Letter from 76 College and University Student Body Presidents to Betsy DeVos, Sec'y, Dep't of Educ., at 2 (Jan. 30, 2019), [https://assu.stanford.edu/sites/g/files/sbiybj6236/f/student\\_body\\_presidents\\_comment\\_on\\_title\\_ix\\_proposal\\_1.pdf](https://assu.stanford.edu/sites/g/files/sbiybj6236/f/student_body_presidents_comment_on_title_ix_proposal_1.pdf).

<sup>116</sup> 2014 Guidance, *supra* note 51, at 32-33; 2011 Guidance, *supra* note 51, at 16-17; 2001 Guidance, *supra* note 50, at 16.

<sup>117</sup> 2014 Guidance, *supra* note 51, at 33; 2011 Guidance, *supra* note 51, at 15-16.

<sup>118</sup> 34 C.F.R. § 106.30(a) (defining "supportive measures").

<sup>119</sup> Letter from National Women's Law Center, *supra* note 108, at 22.

<sup>120</sup> Letter from 36 U.S. Senators to Betsy DeVos, Sec'y, Dep't of Educ., at 6-7 (Jan. 30, 2019) [hereinafter Letter from 36 U.S. Senators], <https://www.help.senate.gov/imo/media/doc/013019%20Proposed%20Title%20IX%20reg%20caucus%20letter.pdf>.

<sup>121</sup> U.S. Dep't of Educ., Office for Civil Rights, 2015-16 Civil Rights Data Collection: School Climate and Safety Report (2018), <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>.

<sup>122</sup> 34 C.F.R. § 106.12(b).

<sup>123</sup> *Id.*

<sup>124</sup> 85 Fed. Reg. 3190.

<sup>125</sup> National Women's Law Center, *NWLC Submits Comment Opposing Betsy DeVos's Title IX Proposal to Enable Sex Discrimination in the Name of Religion* (Feb. 18, 2020), <https://nwlc.org/resources/nwlc-submits-comment-opposing-betsy-devos-title-ix-proposal-to-enable-sex-discrimination-in-the-name-of-religion>.

<sup>126</sup> *Id.* at 15, 21.

<sup>127</sup> *Id.* at 21.

<sup>128</sup> See Letter from Ass'n of Am. Univs. (AAU) to Brittany Bull at 4 (Jan. 24, 2019), <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Higher-Education-Regulation/AAU-Title-IX-Comments-1-24-19.pdf> (discussing "higher costs associated with the regulation's prescribed quasi-court models");

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Letter from Ass’n of Indep. Colls. and Univs. (AICUM) to Sec’y Elisabeth DeVos at 2 (Jan.23, 2019), <http://aicum.org/wp-content/uploads/2019/01/AICUM-public-comments-on-Notice-of-Proposed-Rulemaking-%E2%80%9CNPRM%E2%80%9D-amending-regulations-implementing-Title-IX-of-the-Education-Amendments-of-1972-Title-IX%E2%80%9D-Docket-ID-ED-2018-OCR-0064.pdf> (“[s]uch financial costs and administrative burdens may be overwhelming”); Letter from The School Superintendents Ass’n (AASA) to Sec’y Elisabeth DeVos at 1, 2, 3 (Jan. 22, 2019), [http://aasa.org/uploadedFiles/AASA\\_Blog\(1\)/AASA Title IX Comments Final.pdf](http://aasa.org/uploadedFiles/AASA_Blog(1)/AASA%20Title%20IX%20Comments%20Final.pdf) (discussing “new and unaccounted for costs in changing current policies and procedures, ... increased litigation costs,” “a real cost in terms of training and professional development to changing practices and policies,” and “much costlier redirection of district resources towards addressing Title IX complaints and violations in court”).